APPEAL NO. 001601

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 9, 2000. With regard to the only issue before him, the hearing officer determined that the respondent (claimant) had disability (as defined in Section 401.011(16)) from August 12, 1999, and continuing to the date of the CCH.

The appellant, a self-insured state hospital, referred to as the self-insured or the carrier, appeals, contending that the claimant had a longstanding preexisting spinal condition; that the claimant only sustained a minor injury; that the claimant had continued to work for some months before being taken off work; that the claimant's unemployment was a result of being terminated, not the compensable injury; that the claimant's condition was an ordinary disease of life; and that the hearing officer failed to make findings regarding the aggravation of a preexisting condition. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant, in a pro se response, answers the carrier's appeal and urges affirmance.

DECISION

Affirmed.

At the outset, we note that the only issue before the hearing officer was disability which is defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. The claimant's position at the benefit review conference (BRC) was that her disability began on August 12, 1999, and is continuing. It was the carrier's position "that the claimant's disability began on October 5, 1999." The benefit review officer entered an interlocutory order to begin payment of temporary income benefits beginning on October 5, 1999.

It is relatively undisputed that the claimant had scoliosis and had two spinal fusion surgeries, apparently in the 1970s when she was a teenager. The claimant began work at the self-insured's hospital on December 1, 1998, and on _____, while in a training session on how to restrain patients, the claimant was twisted and dropped to the floor. The claimant was seen by one of the self-insured's physicians the same day and was diagnosed with a "low back strain (muscle injury)." The claimant was released to return to work. What she did when she returned to work is in dispute. The claimant testified that she was placed in a "one on one" position where she was assigned to watch a single patient from 10:00 p.m. to 6:00 a.m. and that she could accomplish this by sitting in a chair while the patient slept. The self-insured contends that the claimant's duties "were the same as anyone elses'" and that no accommodations were made by the self-insured. The hearing officer, in a disputed finding of fact, found that the claimant's "duties were essentially a light duty position compared to her duties at the time of the injury." The claimant continued in this position, without any lost time, until June 8, 1998, when the claimant was terminated. The exact reasons for the termination are in dispute, but the hearing officer made an unappealed finding that the claimant was terminated for cause.

It is undisputed that the claimant applied for and received unemployment compensation while she was off work until she found a job in a cafeteria as a "floor attendant" on July 6, 1999. The cafeteria assistant general manager, in a letter, described the duties of a "floor attendant" in detail (basically working on the serving line, doing drink refills, etc.) and stated that there "was not any heavy lifting required" and that coworkers would help if the claimant "felt she needed assistance." A statement by a coworker states that "when [the claimant] first started she was in pain" and that the coworker assisted the claimant. The claimant testified that, nonetheless, her back pain got progressively worse until she was forced to quit the cafeteria job on August 11 or 12, 1999. The claimant sought treatment from Dr. O.

Dr. O took the claimant off work on August 11, 1999. Initial reports focus on the claimant's preexisting spinal conditions, the scoliotic curvature of the spine and spinal fusion, and whether there had been a failure or fracture of the old fusion. In a report dated September 8, 1999, Dr. O said the claimant was "unable to perform her duties [at the cafeteria] . . . because of the failed conservative measures. . . ." Other notes and reports reference the claimant's "takedown procedural training" with the self-insured and problems with the carrier. In a note dated April 22, 2000, Dr. O states that the claimant "was off work due to her back injury from August 11, 1999, until December 15, 1999, when she was referred to another physician." There are reports from a referral doctor dealing with the claimant's medical condition but not directly addressing the ability to work.

The claimant subsequently began treating with Dr. R, who, in reports beginning on November 4, 1999, takes the claimant off work ("incapable of gainful employment at this time") and addresses the claimant's spinal condition. In an addendum to the November 4, 1999, report, Dr. R pithily states:

> **ADDENDUM:** I want to be quite emphatic about this statement. This patient is here being seen and is suffering with pain not because she had the scoliosis fusion but because she was dropped on her butt and twisted. This patient managed for some thirty years to do well in spite of the fusion. It was not until such time that she was manhandled that basically she became symptomatic. This is not because of her scoliosis fusion.

The hearing officer found that the claimant had disability beginning August 12, 1999, and continuing.

The carrier's appeal at points suggests that the claimant is suffering from an ordinary disease of life (the scoliosis), complains that the "hearing officer failed to even find what the injury was on _____ and how, after six months of working her original job, and a month at a later job, that the 'injury' would cause disability." The carrier argues, and cites Appeals Panel decisions, that the claimant's condition is the "mere recurrence or manifestation of a prior injury." The claimant correctly points out that the issue of a compensable injury is not before the hearing officer. We would further note that at the BRC the carrier appeared to concede that the claimant had disability beginning on October 5, 1999, and was only disputing the period between August 12 and October 5, 1999.

In any event, the hearing officer was well aware that the claimant worked for the self-insured from December 8, 1998, to June 8, 1999, when she was terminated, but made a specific finding that that duty was "essentially a light duty position." The self-insured emphasizes the initial diagnosis of its own in-house staff doctor that the claimant only had "a minor strain injury." It is undisputed that the claimant drew unemployment compensation and, in fact, found another job after she was terminated by the self-insured; however, the evidence and the claimant's testimony reflect that she was unable to retain the cafeteria job due to her compensable injury. We also disagree with the carrier's contention that "[n]one of the doctors linked [the claimant's] conditions to the training incident on _____"; *see* Dr. R's addendum of November 4, 1999.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge